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Nos. 21, 22, 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

THE UNITED GAS IMPROVEMENT COMPANY, ET AL., *Petitioners,*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents.*

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner,*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents.*

FEDERAL POWER COMMISSION, *Petitioner,*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT, CALLERY PROPERTIES, INC.

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October 1, 1965

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BRIEF FOR RESPONDENT, CALLERY PROPERTIES, INC.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 620-642) is reported at 335 F. 2d 1004. The opinions of the Federal Power Commission, Opinions Nos. 398 (R. 549) and 398-A (R. 606), are reported at 30 F.P.C. 283 and 682.

JURISDICTION

The judgment of the court of appeals reversing the Commission's order and remanding the proceedings was entered on August 14, 1964 (R. 643). Orders were entered granting the petitions for writs of certiorari in Nos. 21, 22 and 32 on March 8, 1965 (R. 645-647). 380 U.S. 931. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Whether the court of appeals was correct in holding that, while the Commission need not convert a producer certificate hearing under Section 7(e) of the Natural Gas Act into a full-blown rate case, the Commission is under a duty to hear and evaluate all relevant evidence bearing on the present and future public convenience and necessity when it is urged, or held, that a producer's proposed price is out of line.

2. Whether the court of appeals was correct in holding that the Commission may not properly condition the grant of a permanent certificate under Section 7 of the Natural Gas Act upon a requirement that the applicant thereafter waive the rate filing procedures reserved to natural gas companies under Section 4 of the Act.

3. Whether the Commission has authority under Section 7(e) of the Natural Gas Act to require an applicant to refund amounts previously collected pursuant to unconditional permanent certificates.

4. Whether, assuming *arguendo* that the Commission had the power to reduce rates retroactively and to order refunds in the unique circumstances of the in-

stant case, the court below was correct in holding (a) that the producers were entitled to just and reasonable rates under the Natural Gas Act, and (b) that a balancing of the equities required that refunds not be ordered pending a determination of the justness and reasonableness of the contract rates collected by the producers over a period of years under unconditional permanent certificates.

STATUTE INVOLVED

Pertinent provisions of the Natural Gas Act (Sections 4, 5, 7(c) and (e), and 19(b), 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w) are set out in appendices to the briefs for Petitioners in Nos. 21, 22 and 32. Section 19(c) of the Natural Gas Act provides:

> "Sec. 19(c). The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order." [52 Stat. 831 (1938); 15 U.S.C. § 717r]

STATEMENT

Respondent Callery Properties, Inc., is a nominee corporation engaged in the business of selling natural gas and oil produced from various fields in the States of Louisiana and Texas.[1] A substantial portion of the gas which it sells is resold by pipelines in interstat-

[1] Callery is one of three related entities engaged in the business of exploring for and developing oil and gas reserves on behalf of individual investor-participants. As agent for approximately 300 individuals, estates, trusts and corporations for whom it holds record title in producing properties, Callery owns none of the gas which it sells (R. 326-327).

commerce and Callery is therefore subject to regulation by the Federal Power Commission as a "natural-gas company" under the Natural Gas Act.

In December 1958 Callery filed two applications with the Commission for certificate authority under Section 7 of the Act covering proposed sales of gas to Hope Natural Gas Company from fields in Acadia and Iberia Parishes, Louisiana. The initial contract price in each case was 21.5 cents per Mcf, plus 2.05 cents per Mcf tax reimbursement. A hearing was held on Callery's applications in conjunction with related pipeline and producer applications, and on August 10, 1959 the Commission issued its Opinion No. 327, 22 F.P.C. 378 (R. 116) granting Callery and other producers permanent unconditioned certificates of public convenience and necessity in accordance with their applications.

The Public Service Commission of New York sought rehearing of Opinion No. 327 and later judicial review on the ground that Callery and the other producers had failed to demonstrate why their sales were required by the public convenience and necessity at prices higher than those which prevailed in Southern Louisiana prior to the Court's decision in *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (*"Catco"*) (R. 144).[2] Basing its decision on *Catco,* the Court of Appeals for the District of Columbia reversed Opinion No. 327 and remanded the case to the

[2] While urging that the certificates of the producers be conditioned at a price no higher than that demonstrated by the record to be in the public convenience and necessity, the New York Commission did not seek a stay of the certificate authority granted as it might have done under Section 19(c) of the Act. Being under a dual obligation to the pipeline purchaser and to royalty owners to commence production at the earliest date, Callery began deliveries of gas to Hope in December 1959.

Commission for further proceedings in which the producer applicants might, if they so chose, "either augment the record so as to support a certification without price condition, or seek a certification appropriately conditioned." *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146, 150 (D.C. Cir. 1961).

On May 10, 1961 the Commission moved to carry out the judgment of the D.C. Circuit by consolidating the remanded proceedings involving Callery's sales with the area rate proceeding instituted on that date in Docket No. AR61-2 "to determine the rate, or rates, at which the public convenience and necessity requires, and a just and reasonable rate, or rates, for sales of natural gas" in Southern Louisiana, 25 F.P.C. 942, 944. Eight months later, without a hearing having been held in either the Southern Louisiana area proceeding or in Callery's remanded dockets, the Commission issued an order on January 10, 1962 advising Callery for the first time that the Commission might later require as a condition of amended certificate authorization that Callery refund revenues received from Hope from the date of first delivery of gas (R. 395).[3] Thereafter, on March 7, 1962, Callery's two dockets

[3] Under its agency agreement with the owners of the gas which it sells, Callery is legally bound to distribute all income when received and may not withhold income from a current owner save in those instances where it has received prior notice of a potential refund liability. Since the ownership in the properties involved had changed radically in the period following the commencement of deliveries of gas to Hope and many of the original owners and recipients of income were no longer available, Callery sought review of the Commission's January 10, 1962 order. Its petition for review was dismissed by the Fifth Circuit without prejudice. *Callery Properties, Inc.* v. *Federal Power Commission*, 5th Cir. No. 19563 (September 20, 1963).

were severed from the Southern Louisiana proceeding and consolidated with other remanded dockets for separate hearing and disposition, 27 F.P.C. 482 (R. 409).

In the hearing that followed, which lasted four days and in the course of which virtually all evidence offered by Callery and the other producers in support of their initial contract prices was excluded as irrelevant, the presiding examiner ruled that the sole criterion for determining the initial price at which the producers' sales would serve the public convenience and necessity was the general price level prevailing in Southern Louisiana in 1957 and 1958 under contracts free from the infirmities which led the courts to reverse the Commission's original unconditional certifications. On December 7, 1962 the examiner issued a decision in which he determined the "in line" price for gas sold in Southern Louisiana under 1957 and 1958 contracts to be 20.0 cents per Mcf, including tax reimbursement of 1.5 cents per Mcf, and ordered Callery and the other producers to refund to their respective purchasers all amounts collected in excess of a base price of 18.5 cents from the date of initial delivery of gas (R. 490).

On July 17, 1963, by Opinion No. 398 and order issued in *Placid Oil Company, et al.*, 30 F.P.C. 283 (R. 549), the Commission affirmed the examiner's decision in all material respects. The examiner's conclusion that economic and cost evidence were irrelevant to the determination of a proper "in line" price was affirmed in particular, as was his finding that the producers be required to refund amounts previously collected under unconditional permanent certificates. In addition to the other requirements of the examiner's order, which the producers were given no option to

reject, the Commission added a further condition imposing a moratorium on all rate increase filings in excess of 23.55 cents per Mcf, including tax reimbursement, until July 1, 1967, or the final decision in the Southern Louisiana area rate proceeding, whichever is earlier (R. 582).

On review of Opinion No. 398, the court below held that the Commission erred in three respects. The court found first that the Commission had failed in its statutory duty to determine the present and future public convenience and necessity when it restricted the scope of its inquiry in the remanded proceedings to preexisting prices in Southern Louisiana. While agreeing that the question of whether a producer's proposed price is in line or not is an important and sometimes decisive factor in the certification of his sale, the court held that factors other than price exist which must be taken into consideration and that when, as in this case, it is urged and held that the proposed price is out of line, the Commission is under a duty to hear and evaluate all relevant evidence bearing on the public convenience and necessity.

Secondly, the court held that the moratorium on rate filings, imposed as a condition of permanent certification, was unlawful and tantamount to the Commission's repeal of a right reserved to natural gas companies by Congress under Section 4(d) of the Act. Finally, while upholding in the unique circumstances of the case the Commission's power to require refunds, the court held that the proper measure of refund liability should be the difference, if any, between the contract price and a just and reasonable rate determined after appropriate hearing under Sections 4 and 5 of the Act.

SUMMARY OF ARGUMENT

I.

In *Catco,* the Court found that, while rates were not the only factor bearing on the public convenience and necessity, the issue of price was in that case and is generally a consideration of prime importance in the issuance of producer certificates. Noting that in the absence of a certificate condition lowering the initial rate any adjustment in price as a result of a subsequent determination of a just and reasonable rate under Section 5 of the Act would be prospective only, the Court admonished the Commission to make use of its conditioning power under Section 7 of the Act whenever the application of the producer signaled on its face or on the presentation of evidence a situation which would probably not be in the public interest. The Commission was reminded at the same time of its statutory duty under Section 7(e) to weigh and evaluate all factors bearing on the public convenience and necessity at the time of permanent certification.

This case involves the Commission's effort to evolve an effective program of producer regulation built around the first admonition of *Catco* without reference to the second. It arises in the unique context of producer sales begun in 1959 under permanent unconditioned certificates later vacated by the courts in the light of *Catco* for precisely the reason which led to the reversal in *Catco, i.e.,* the failure of the producer applicants to show the "reason why" their sales of gas were required by the present or future public convenience and necessity at prices higher than the weighted average of prices prevailing in the producing area at the time of certification. On remand, the producer Respondents,

proceeding in the total absence of any evidentiary standard of proof from the Commission, sought to show by a wide variety of cost and economic data why their sales were required by the public convenience and necessity at prices which might otherwise be considered out of line. This evidence was rejected in its entirety on a finding that the only relevant factor to be considered in determining whether the public convenience and necessity will be served by the issuance of a permanent producer certificate under Section 7(e) is price, and that price must be free from the "infirmities" which led the Court to reverse the Commission's order in *Catco*.

On review, the court of appeals found that price, while undeniably important, was not "the whole thing" and that the Commission had failed in its duty under Section 7(e) to determine the "present or future public convenience and necessity" when it restricted its whole inquiry to previously certificated prices in Southern Louisiana.

We believe that the decision below was in complete accord with the statute and this Court's interpretation of the Commission's duties thereunder in *Catco* and other cases. The fears expressed by the Commission and the other Petitioners that the decision of the court below will result in a flood of evidence in producer certificate cases of such proportions as to frustrate and render producer regulation ineffective are groundless. In the present climate of producer regulation, where virtually all new gas sales are proposed and permanently certificated at the Commission's guideline prices, the number of contested or full evidentiary hearings would be minimal. Moreover, while holding that the evidence rejected by the Com-

mission in the instant case obviously bore on the public convenience and necessity, the court below did not purport to determine what evidence would or would not be sufficient to establish the "reason why" an out of line price might be required by the public interest. Instead, the court indicated the obvious solution, which Petitioners have chosen to ignore, namely, the formulation of basic evidentiary standards.

II.

The Commission's contention that it must be given the right to declare a moratorium on rate increase filings by producers under Section 4(d) as a condition of permanent certification pending the determination of just and reasonable rates is in conflict with the scheme of the Act and was properly rejected by the court below. The producer's one remedy to protect himself from being required to sell his gas at less than a just and reasonable rate lies in the right reserved to natural gas companies by Congress to propose changes in their rates under Section 4(d) where permitted by contract. That right was specifically recognized by the Court in *Catco* and *Sunray*.

III.

While Callery does not agree with the decision of court of appeals insofar as it affirms the right of the Commission to require refunds in the circumstances of the instant case, the further holding that refunds should not be ordered pending a determination of the justness and reasonableness of Callery's contract price is eminently correct in its recognition of the equities involved. Should Callery be required to refund amounts previously collected based on an "in line"

price and should it later be determined that the contract price was just and reasonable, Callery would have no way of recovering the difference between the "in line" price and the just and reasonable rate to which its owners were entitled.

ARGUMENT

Introduction

This case presents for the Court's consideration, as the Commission points out (FPC Br., p. 7), two aspects of the regulatory program devised by the Commission in response to the Court's admonition in *Catco*[4] that it exercise its conditioning power under Section 7 of the Natural Gas Act to afford adequate rate protection to the public during the extensive period of time required to determine just and reasonable rates. Under this program, which went into effect following *Catco,* the Commission has undertaken to condition the price at which all new gas enters the market at a so-called "in line" level based on previously certificated prices in the producing area. All evidence other than that relating to the level of prices under "non-suspect" or "clean" certificates, *i.e.,* those not subject to the infirmities which led to the reversal in *Catco,* is excluded as irrelevant. More recently, the Commission's program for producer regulation has involved the proscription of rate increase filings under Section 4(d) of the Act above an "anti-triggering" level pending the determination of just and reasonable rates.

The Commission and Petitioners aligned with the Commission attack the decision of the court below pri-

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[4] *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1954).

marily on grounds of administrative convenience. They contend first that, if permitted to stand, the decision below will necessarily mean that certificate proceedings under Section 7 will hereafter become "bogged down by the consideration of evidence even more voluminous than would be relevant in rate proceeding" (FPC Br., p. 9). Secondly, they argue that the Commission must be given the right to freeze producer rates until such time as just and reasonable rates are determined under Sections 4 and 5 of the Act; otherwise, it is contended, widespread triggering may occur which could disrupt the existing rate structure to the detriment of the consuming public. Finally, while supporting the holding that Callery and the other producer Respondents may be required to refund amounts previously collected under their unconditional certificates, Petitioners and the Commission object to the use of the statutory standard of justness and reasonableness as a proper measure of refund liability. In Petitioners' view, Respondents were not entitled to a just and reasonable rate during the period of their unconditional certification but only to an "in line" price.[5]

In light of the arguments raised by Petitioners, it is important at the outset that this case be viewed in its proper setting and, more important, that note be taken of what the court below decided and what it did not decide. The proceedings before the Commission which resulted in Opinion No. 398 did not involve an

[5] Petitioners' present position with respect to the refund issue is at variance with what would appear to have been their position prior to the issuance of Opinion No. 398 in the remanded proceedings. See, concurring and dissenting opinion of Commissioner O'Connor, Opinion No. 398, issued July 17, 1963 (R. 588).

"initial" certification in the usual sense of the word, nor did they involve a situation wherein temporary sales authority had been granted subject to price or refund condition. Prior to the vacation of their original certificates, Callery and the other producers had sold their gas under valid, subsisting permanent certificates which had not been stayed and which were legally effective and binding. In each instance, the original certification was set aside for the failure of the producer to show the "reason why" his sale was required by the public convenience and necessity at the price proposed. On remand, the Commission declined to receive evidence offered by the producers designed to show the "reason why."

In answer to Petitioners' arguments, we will show that the court of appeals below properly held that the Commission had failed in its statutory duty under Section 7(e) of the Act to determine the "present or future public convenience and necessity" when it limited the entire scope of its inquiry to previously certificated prices in the Southern Louisiana area; that the decision below is fully in accord with *Catco* and the decisions of the remanding courts; and that, contrary to Petitioners' dire predictions, the court's holding will in no way frustrate or impede effective producer regulation. We will likewise show that the moratorium placed on the filing of otherwise authorized rate increases under Section 4(d) of the Act cannot be justified as a stopgap measure and is, moreover, in basic conflict with the scheme of the Act as interpreted by this Court in *Catco* and other cases.

Finally, we will show that whereas Callery disagrees with lower court's holding with respect to the Commis-

sion's inherent power to require refunds in this case, its further holding that refunds should not be ordered pending a determination of the justness and reasonableness of the contract prices is eminently correct in the unique circumstances of this case.

I. THE COURT OF APPEALS CORRECTLY CONSTRUED THE COMMISSION'S STATUTORY DUTY UNDER SECTION 7 (e) OF THE ACT IN LIGHT OF CATCO AND OTHER CASES

While holding that the Commission need not convert a producer certificate hearing under Section 7(e) of the Act into a rate case as a prerequisite to the issuance of the requested authorization, the court of appeals did hold that the Commission has a clear duty to hear and evaluate all relevant evidence bearing on the present and future public convenience and necessity when it is urged or held, as it was in each of the remanded proceedings in this case, that a producer's proposed price is out of line. The court's holding is in complete accord with and fully supported by the Court's decision in *Catco.*

In *Catco,* in addition to admonishing the Commission to make proper use of its conditioning power under Section 7 where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, the Court further admonished the Commission as to its duty in determining the public convenience and necessity. The Court expounded that duty in the following language:

> "* * * Nor do we hold that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates. What we do say is that the inordinate delay presently existing in the process-

> ing of § 5 proceedings requires a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7. Their proposals must be supported by evidence showing their necessity to 'the present or future public convenience and necessity' before permanent certificates are issued. This is not to say that rates are the only factor bearing on the public convenience and necessity, *for § 7(e) requires the Commission to evaluate all factors bearing on the public interest.* * * *" (360 U.S. at 391) (Emphasis supplied).

In its subsequent decision in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961), the Court emphasized that "*all*" factors bearing on the public interest must be considered (365 U.S. at 8), and took note of its previous statements that the term "public convenience and necessity" connotes a "flexible balancing process, in the course of which all the factors are weighed prior to final determination" (365 U.S. at 23).

A. The Decision Below Was Fully in Accord With the Decisions of the Remanding Circuits

Not only was the lower court's holding in accord with the Court's decisions in *Catco* and *Transco, supra,* but it likewise was fully consistent with the decisions of the other remanding circuits. Thus, the Ninth Circuit in *United Gas Improvement Co.* v. *Federal Power Commission,* 283 F. 2d 817, 821 (1960), specifically pointed out that circumstances such as increased production costs might well justify unconditional permanent certification of a producer's sale at a price higher than a previous line of prices because of public interest requirements. The Tenth Circuit likewise found that:

> "Public convenience and necessity may require certificating a sale when the price is 'out of line'." *United Gas Improvement Co.* v. *Federal Power Commission,* 287 F. 2d 159, 163 (1961).

The Commission's order was reversed by the Fifth Circuit in *United Gas Improvement Co.* v. *Federal Power Commission,* 290 F. 2d 147 (1961), for lack of evidentiary support on a finding that "too little" consideration had been given to what might ultimately be a just and reasonable rate (290 F. 2d at 148).

It thus seems clear that, in the circumstances of the instant case, consistent with its duty under Section 7(e) of the Act to determine the present or future and not the past convenience and necessity, the Commission was required on remand to re-examine and evaluate all aspects of the producers' sales, including the initial price issue, in light of current conditions in the industry. As previously noted, the case below did not involve "initial" certification and that fact alone is sufficient to resolve the claimed conflict with the D.C. Circuit's decision in *Public Service Commission of New York* v. *Federal Power Commission,* 329 F. 2d 242 (1964) (*"Skelly"*). Indeed, when the two cases are viewed in proper perspective and context, the claimed conflict between the decision below and the D.C. Circuit's decision in *Skelly* plainly does not exist.

Unlike *Skelly* and the other decisions relied upon by Petitioners (FPC Br., pp. 27, 33), which involved *initial* certifications, the case below was unique in that it involved the residuum of a large number of permanent certifications which had been remanded to the Commission in the light of *Catco* for the failure of the producers to show the "reason why" their sales were required by the public convenience and necessity at

prices which would otherwise be considered out of line. By the time the Commission issued its decision in the remanded proceedings in July 1963, most of the producer's sales were ancient history in the sense that known changes in the national economy had occurred in the period following their initial certification. Under the circumstances, consistent with its duty under Section 7(e), the Commission was under a duty to re-examine all facets of the public interest in the light of the current conditions then prevailing.

The Fifth Circuit's ruling that it do so in this case and that it not restrict its inquiry solely to the "in line" price in prior years was nowise inconsistent or in conflict with the D.C. Circuit's endorsement of the Commission's "in line" determination. As the court below noted (R. 632), the evidence proffered and rejected in *Skelly* was of a much more limited nature and, while holding that consideration of the proffered evidence was not essential to the initial certification in that case, Judge Fahy was careful to point out that:

> "* * * In so deciding we need not hold that the Commission may never consider such evidence if the circumstances in a particular case move it to do so consistently with its obligations under *Catco* (329 F. 2d at 247).

Bearing in mind that it was the Commission's failure to carry out its obligations under *Catco* that prompted the same panel of the D.C. Circuit to reverse and remand Opinion No. 327 for further proceedings to permit Callery and the other producers either to "augment the record" or to seek "appropriately conditioned" certificates (287 F. 2d 146, 150), it is illogical to assume that any real conflict exists between the court's subsequent decision in *Skelly* and the holding

below. In remanding Opinion No. 327 to the Commission with instructions to "augment the record," the D.C. Circuit obviously contemplated a hearing in which the producers would be afforded the opportunity of showing by substantial evidence the "reason why" their sales were required at the prices proposed in their contracts. Such a showing was obviously impossible when the Commission summarily excluded as irrelevant all evidence other than that relating to previously certificated prices in the area.

B. The Decision Below Will Not Frustrate Effective Regulation of Producers

Petitioners express the fear that the holding below will hereafter turn every producer certificate case under Section 7 into a "full-blown rate case." They unanimously predict that, if allowed to stand, the Fifth Circuit's decision will open the floodgates overnight to a deluge of cost and economic evidence more appropriate to a rate proceeding under Section 4 or 5 of the Act, thereby seriously impairing the Commission's current program for achieving effective producer regulation. Petitioners' fears in this regard are exaggerated, to say the least.

In the first place, the vast majority of new gas sales contracts being entered into today are not only in the form prescribed by the Commission's rules but at the prices prescribed for the particular producing area shown in the Commission's Statement of General Policy No. 61-1, 18 C.F.R. § 2.56. Under the streamlined certificating procedures now in effect, literally hundreds of new sales have been and will continue to be permanently certificated at the Policy Statement

"guideline" prices in record time.* In those few cases where the proposed initial price exceeds the Commission's guideline price, or where it is urged by an intervenor that the initial price is out of line, the producer may request temporary authorization subject to such conditions as the Commission may attach or accept permanent certification at a lower price. It necessarily follows that in the present climate of producer regulation the number of cases in which the Commission would be required to hear and evaluate evidence proffered by the applicant in support of an out of line price would be relatively few.

Beyond that, and more important, the court below did not purport to indicate either the quantum or the nature of the proof required to sustain the certification of a sale at a higher than "in line" or out of line initial price. While indicating that the economic and cost evidence excluded by the Commission was clearly germane and relevant in that it bore on broad questions of public convenience and necessity, the court recognized the administrative burden involved and the necessity for expedition in the discharge of the Commission's duties and responsibilities under the Act. The Court therefore pointed to a specific, workable solution, which the Commission and Petitioners have chosen to ignore, i.e., that the Commission avoid the delays which would necessarily attend the trial of a full-scale rate case by announcing the types of evidence deemed relevant and the nature of the proof

* On February 26, 1964, the Commission announced that during the first 6½ months of experience under its new procedure for handling producer certifications it disposed of 806 filings in an average time of 42.3 days for each item, compared with approximately 100 days under the old process. See FPC Press Release No. 13156, issued February 26, 1964.

required to support certification at an initial price deemed or urged to be out of line (R. 632, n. 31).

The Commission's Rules under the Natural Gas Act, 18 C.F.R. §§ 157.5-157.22, are specific and detailed in their requirements as to exhibit material which must accompany pipeline certificate applications under Section 7 of the Act. Based on the information supplied by the pipeline in advance of hearing, the Commission is in a position to evaluate and weigh all of the economic and financial aspects of the proposal. Suffice it to state, had Callery and the other producers in this case had similar guidance in the form of evidentiary standards prescribed by Commission rule in advance of the remanded hearing, this case might never have arisen. To date, the Commission has not seen fit to promulgate producer certificate rules which would provide any guidance in determining the nature of the evidence which might be deemed relevant to support certification at an out of line price.

The true vice of the Commission's "in line" approach lies in its application whereby, in the certification of new sales, all "present Commission action is judged solely by measuring it against past Commission action" *Union Texas Petroleum, et al.*, 32 F.P.C. 279, 300 (1964). Thus, where all new certificates are conditioned to an "in line" price on the basis of a previously certificated "in line" price, the process becomes circular and involuted in time to a point where it becomes mathematically impossible to justify any price higher than the original "in line" price. Certainly, as the court below recognized, it is inconceivable that Congress meant to freeze producer rates to 1956-58, or any other particular time (R. 630). We respectfully submit that, while price is undoubtedly important in determining wherein the public interest lies, it is

not, as the court observed, "the whole thing" (R. 628) and the Commission clearly erred in restricting its inquiry in this case to price alone.

II. THE MORATORIUM ON RATE INCREASE FILINGS CANNOT BE JUSTFIED AS A STOPGAP MEASURE SINCE IT IS IN BASIC CONFLICT WITH THE REGULATORY SCHEME ENVISAGED BY CONGRESS

In its decision in *Federal Power Commission* v. *Hunt,* 376 U.S. 515, decided last Term, the Court held that:

> "Under the procedures of the Act, it is at the point of permanent or unconditional temporary certification that the provisions of § 4 become applicable. The gas has been permanently certificated into interstate commerce and the independent producer is then free to pursue the rate filing procedure of that section." (376 U.S. at 523).

While it is true that the Court did not have before it in *Hunt,* and specifically left open, the question of the extent of the Commission's power to condition a permanent certificate of public convenience and necessity (as opposed to temporary authorization) upon the applicant's agreement to waive the right to file for increased rates under Section 4(d) of the Act, we believe the court below was correct in holding that all rights granted and reserved to natural gas companies by Congress under the Act become fully operative at the time of permanent certification.

Were it otherwise, there would be little reason for the Commission to carry the regulation of producers beyond the point of permanent certification since, based on a finding of public convenience and necessity under Section 7(e) of the Act, the Commission could, without more, effectively require that a producer sell his gas at one price and one price only over the entire

life of the dedicated reserve, *i.e.*, declare a permanent moratorium at the time of permanent certification. Unlike Petitioners, we read nothing in the Court's decision in *Texaco* (*Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33) which suggests that the Commission could properly achieve this end by rulemaking, nor do we understand *Catco* to stand for the proposition that the Commission may arbitrarily suspend at will the operation of Section 4 of the Act in the case of independent producers once they have been permanently certificated as "natural-gas companies" under the Act.

In the *Hope* case,[7] the Court found that the intent of Congress in passing the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas. That this purpose was to be accomplished under an act which did not contemplate a rate freeze was made clear by the Court in *Bowles* v. *Willingham*, 321 U.S. 503, decided the same Term as *Hope*, when it distinguished the Natural Gas Act from a price freeze statute, declaring that the Act is a price-fixing statute in which "Congress has provided for the fixing of rates which are just and reasonable in their application to particular persons and companies (321 U.S. at 516-17).[8]

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[7] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).

[8] In *Bowles* v. *Willingham*, the Court noted that the landlord who was precluded from receiving a fair and equitable rent for his particular property under the Emergency Price Control Act of 1942 had no cause to complain that the Act worked an unconstitutional taking of his property since the Emergency Act provided that "nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent" (321 U.S. at 517. By contrast, the Natural Gas Act requires that a jurisdictional sale, once begun, may not be abandoned without prior Commission approval under Section 7(b). See *Catco*, 360 U.S. at 389.

Moreover, while recognizing in *Hope* and *Catco* that the underlying Congressional purpose was to protect the consumer from excessive charges, the Court has held that the consumer has an interest not only in the price he pays for gas but also in an assured and continuing supply of the commodity itself. *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division,* 358 U.S. 103, 113. To that end, the Court has recognized that rates fixed by the Commission must be just and reasonable both to the consumer and to the natural gas company. Most recently, in commenting on the Commission's proposed area rate proceedings, the Court said that the rates ultimately fixed should not be "so high as to deprive consumers, or so low as to deprive producers of their right to a just and reasonable rate," *Wisconsin* v. *Federal Power Commission,* 373 U.S. 294, 310. Finally, in *Catco* and in *Sunray*[9] the Court held that the producer's one remedy to protect himself from being required to sell his gas at a price which was less than just and reasonable and therefore confiscatory lay in his right to increase his price under Section 4(d) in accordance with his contract. While the Act would give the Commission the right to suspend the collection of the increased price for a period of five months, there is no suggestion in the legislative history of the Act or in this Court's decisions interpreting the Act that Congress intended a moratorium period of greater duration once the sale or service rendered has been permanently certificated by the Commission.

The Commission has to date applied no standard other than historical price structure, or the "in line" price concept, where the producer's proposed price is

[9] *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137, 156.

alleged to be out of line. The Commission's final decision in the Southern Louisiana area rate proceeding cannot be expected to provide a panacea for the recurrent problem facing the Commission of determining the initial price at which new gas is required by the present or future public convenience and necessity since, as is now the case in Docket No. AR61-2, where just and reasonable rates for the area are being determined on 1960 cost data, the final determination will always be outdated by the time it is made.[10] Meanwhile, it is vital that the producer's one remedy to protect himself, namely, the right to file for and collect his contract price subject to refund, will be preserved.

III. ASSUMING THE COMMISSION HAD THE POWER TO REQUIRE REFUNDS IN THIS CASE, THE COURT BELOW PROPERLY HELD THAT REFUNDS SHOULD NOT BE ORDERED PENDING A DETERMINATION OF THE JUSTNESS AND REASONABLENESS OF THE PRODUCER'S RATES

A. The Commission Has No Inherent Equitable Powers

It is Callery's position, which it urged unsuccessfully below, that the Commission is not endowed with any inherent equitable powers. The fact that the Commission has a statutory existence does not confer any implied or inherent power upon the Commission to do what it did in this case, namely, order refunds of amounts collected pursuant to unconditioned permanent certificate authorization. The Commission is not, like a court, a dispenser of equity and it follows from its lack of equitable power that it had no power or

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[10] In its recent Permian Basin Area Rate Opinion No. 468, issued August 5, 1965, the Commission has further extended its regulation of rates by moratorium by proscribing any rate increase filings above the prescribed area ceiling until January 1, 1968, without special order of the Commission.

jurisdiction to apply an equitable doctrine, namely, restitution.

Thus, in *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission,* 291 U.S. 587, the Court noted that:

> "The [Federal Trade] Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes * * * but, that accomplished, [it] has not the additional powers of a court of equity to grant other and further relief * * * on the theory that this is necessary to render effective the prescribed statutory remedy * * *." 291 U.S. at 598.

Moreover, as the Supreme Court found in *Federal Trade Commission* v. *Eastman Kodak Co.,* 274 U.S. 619, any so-called "equitable" foundation for the refund required in this case could only be examined by the court below against the administrative authority delegated to the Commission by the Natural Gas Act. Under the Act, the Commission has no authority to fix rates retroactively, *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591, 618. Accordingly, since the refunds ordered by the Commission in this case were based on what amounted to retroactive ratemaking, Callery was and still is of the opinion that the Commission lacked the authority to order refunds in this case.

B. Assuming the Commission Had the Power to Order Restitution In This Case, the Holding Below Was Correct

Based largely on the Court's decision in *Federal Power Commission* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145, Petitioners object to the court's holding deferring refunds pending the determination

of the justness and reasonableness of the producer's contract rates (PSC Br., p. 33). In *Tennessee,* refunds were ordered only *after* a determination under Section 4(e) that the increased rates involved were unjust and unreasonable and, while the Court noted that refunds did not constitute a perfect remedy, it did not suggest that refunds were inappropriate.

In our view, assuming *arguendo* that the court below was correct in holding that refunds could be required in the unique circumstances of the case, the court was also correct in holding that a balancing of the equities required that the proper measure of refunds should be the difference, if any, between the producer's contract price and a just and reasonable rate. The court's recognition of the necessity for balancing the equities in this case is fully supported by the D. C. Circuit's opinion in the *Skelly* case, *supra,* where the court remanded on a finding that "further development and fuller consideration of the equitable factors other than those thought to flow from the mere absence of an explicit refund condition in the temporary certificates" was required (329 F. 2d at 250).

Assuming that the court of appeals' disposition of the refund issue is left undisturbed, it is Callery's further view that its potential refund liability, if any, must be based on an individual determination of the justness and reasonableness of Callery's initial contract price. The equities of the case require as much if the constitutional issue of confiscation is to be avoided.

IV. QUESTIONS NOT PRESENTED

Petitioners have sought to raise in their briefs questions which were not raised in their petitions in Nos. 21, 22 and 32. These questions relate to the fixing of the Commission's "in line" price and the matter of interest on refunds. Neither question was decided by the court below and neither question, we respectfully submit, is within the scope of the questions upon which certiorari was granted. Insofar as we know, no effort was made by Petitioners to amend their petitions to include these additional questions. Should the Court nevertheless be disposed to entertain the issues now raised, Callery would respectfully request leave to respond by supplemental brief and argument.

CONCLUSION

For all of the foregoing reasons, subject to the Court's disposition of the question presented in No. 26, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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